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VIA HAND DELIVERY

Chairman Dan Schnur
Fair Political Practices Commission
428 J Street
Suite 620
Sacramento, CA 95814

Re: October 20th Interested Persons Meeting

Dear Chairman Schnur:

The CPAA has previously expressed its concerns about the public confirmation of complaints and investigations. We appreciate the opportunity to attend the interested persons meeting on October 20 and look forward to discussing our concerns in more detail. We view the interested persons meeting as a helpful opportunity to present these concerns so that any proposed regulatory amendment or FPPC policies will address them.

You have indicated that you welcome a debate about the underlying policy concerning the public acknowledgment of pending investigations inherited from your predecessor. At the outset, we want to clarify that our objection is related to the FPPC's release of any information about an investigation – including the complaint and the confirmation of an ongoing investigation. Much of the public comments about this policy change relate to the issue of whether it is acceptable to have complaints disclosed to the public only on request or proactively on the FPPC website. We hope this Interested Persons meeting will address the underlying 2007 policy change to disclose uninvestigated complaints - not just the question of posting them on the internet.

As mentioned previously, our membership has grave concerns about the practice of disclosing the fact that an investigation is under way. Recently, the Orange County District Attorney had the opportunity to opine about this very issue. In a report about an investigation into potential conflict of interest violations involving the Orange

County Fair Board, the District Attorney criticized the publicizing of an investigation. The Report involved allegations of conflict of interest, among other potential violations, by the Fair Board. Ultimately, the investigation concluded that there was no violation of the law. In the Report's concluding comments, District Attorney Tony Rackauckas stated, "This Report culminates an investigation into allegations which were publicly aired *before* the OCDA ("Orange County District Attorney's Office") had an opportunity to investigate their accuracy. Publicly leaking allegations before an investigation can be conducted, may not only unfairly damage reputations, but also deter reports to law enforcement, inhibit witness cooperation, result in concealment or destruction of evidence and delay or even derail an investigation." (Report of the District Attorney, Investigation into Conflict of Interest Allegations Against the Orange County Fair Board, page 43, emphasis in original.) This compelling statement by an official charged with enforcing the same laws enforced by the FPPC should be taken seriously.

Contrast the sobering caution of the District Attorney with the FPPC's flashing "Investigations" banner on the FPPC website. The FPPC uses an internet advertising technique to attract attention to unproven allegations. Even if the FPPC feels compelled to make this information public, doing so in such a attention-grabbing fashion gives the complaints far more weight than the typical public information posted on the website. At a minimum, if the FPPC insists on continuing to post this information, it should do so in the same manner it posts advice letters, fact sheets and Commission agendas.

The flash with which the FPPC emphasizes these uninvestigated complaints is just one aspect of the serious due process concerns that arise from this policy. The complaint is a one-sided summary of uninvestigated facts and unanalyzed conclusions of law. It is posted on the official agency website accessible to Commissioners and administrative law judges potentially for months accompanied only by a short form letter indicating that the FPPC is investigating. There is no opportunity for the respondent to provide any facts or analysis to provide context or an explanation. If a respondent chooses to provide an explanation, would that information be posted as well? If some respondents post explanations but other do not, will that create the appearance that the respondents who do not choose to post a response have acceded to the complaint? We are interested in hearing from staff how they plan to address this fundamental due process issue.

In a comment letter supporting the FPPC's decision, the California Broadcaster Association noted that it "trusts the Commission will consider some protective initiatives to guard against misuse of the disclosure during an election." We are very curious as to what specific regulatory initiatives the staff would propose to guard against such misuse. For example, no one would seriously argue that the penalty for failing to report a gift because of a misreading of an exception to the gift limit would

warrant forfeiture of office. But that could easily be the effect of a routine FPPC investigation blown out of proportion by press coverage right before an election.¹ We would like to hear staff's response to the CBA's comment about protective measures.

We would also like to hear the staff's explanation as to why this policy does not conflict with Government Code section 83115.5. That section requires that the probable cause process remain private until an actual finding of probable cause is made. While a respondent has an opportunity to make a probable cause proceeding public under Regulation 18361.4(d), the FPPC has no legal right to publicize the proceedings. This provision was apparently meant to allow the FPPC to conduct its investigation in private until the point at which it had fully investigated the allegations and determined that probable cause existed to proceed. We are interested in hearing the staff's analysis of the authority to publicize investigations in advance of the statutorily permitted time frame.

The September 16, 2010, memorandum by Roman Porter to the Commission attempts to address some of these issues but does not provide a full explanation and context. According to the memo, staff is apparently relying on the *San Jose Mercury News v. FPPC* case. The summary of that case presented in the memo indicates that the case involved a closed proceeding, not an open investigation. There is clearly a difference between the two. It is not a stretch to understand why the court found that withholding a closed case file did not serve the public interest. As a result of the *San Jose* case, the FPPC has long made available closed investigation files.

Open investigations are a completely different matter. As the Orange County District Attorney discussed, providing public information about pending investigations can have serious consequences. Is the FPPC taking the position that ongoing investigation files are subject to disclosure upon request as well?² Are the complaint and letter

¹The FPPC has only been posting complaints for a short time and already press coverage of the FPPC's investigations have increased. Shortly after one of the first confirmations of an FPPC investigation appeared on the website, a press article followed. The very first line of the article points out that the "Fair Political Practices Commission is investigating a complaint..." A fact clearly considered more noteworthy than the mere filing of a complaint.
<http://www.pressdemocrat.com/article/20100922/ARTICLES/100929804?Title=Complaint-filed-against-Mendocino-supes-candidate>

² The memo also implies that the press policy was amended on February 7, 2007, to provide access to the investigation file on a case by case basis. That is not correct. The discussion was related merely to whether the Commission should confirm the receipt of a complaint that had been publicized by the complainant. Previously, the Commission had not even confirmed official receipt of the complaint. The discussion had nothing to do with publicizing how the FPPC planned to respond to
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confirming an investigation the only documents subject to disclosure? If they are, what is the authority for distinguishing between those documents and other documents in the file? If they are not, does the staff believe that the Public Records Act does not permit the withholding of investigatory files when the case is not yet completed? If so, then the same problem apparently identified by Mr. Porter arises – investigatory files will only be released if requested by a savvy observer. To solve that problem, will the FPPC begin posting investigatory documents on the website as they are compiled during the course of an investigation?

Lastly, we would like staff to more clearly articulate the public interest in this policy. It is easy during the heat of a campaign to make errors in filings. Posting the uninvestigated complaints allows for no context as to the seriousness of the violation. Twenty-four hour reports filed a day late and missing sub-vendor violations are given the same treatment as complex laundering schemes. The stated policy of deterrence makes no sense in this circumstance. The complete enforcement process allows for the possibility of warning letters, reduced fines or a list of mitigating factors, permitting the FPPC to encourage careful adherence to the rules while at the same time avoiding unnecessary chilling of core First Amendment activity. Since the complaints and investigation letters are posted without a filter, inadvertent violations are treated the same as knowing and willful ones. It is puzzling how public embarrassment will deter inadvertent violations.

Posting the complaints online does not resolve the question of the seriousness or willfulness of the violation any more expeditiously. The investigation will still need to proceed at a normal pace to determine whether enforcement action is warranted. Therefore, even a willful violation will not be identified any more quickly through this process. Given that, we are interested in hearing an articulation of how posting uninvestigated complaints and confirming the investigation of those complaints serves the public interest.

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the complaint. As the memo points out, the policy continued the longstanding practice of not disclosing documents from open cases.

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While we appreciate many of the motivations and explanations for maximizing disclosure and transparency, we believe that the reversal of years of Commission practice has raised many unresolved questions that deserve clear resolution so as not to undermine the effectiveness of, and public confidence in, the enforcement process. We look forward to discussing these issues at the interested persons meeting.

Very truly yours,


On behalf of the CPAA Executive Committee:



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